

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own)
motion, seeking to establish an interim policy)
on eligible telecommunications carrier)
standards.)
)

Application No. C-3415

**COMMENTS OF THE RURAL
TELECOMMUNICATIONS
COALITION OF NEBRASKA**

By Order entered May 4, 2005, the Nebraska Public Service Commission (the "Commission"), on its own motion, opened this proceeding to establish interim guidelines on eligible telecommunications carrier ("ETC") standards (the "Order"). The Rural Telecommunications Coalition of Nebraska ("RTCN")¹ commends the Commission for initiating these proceedings and respectfully submits the following comments in connection with the Commission's Order:

Commission Authority

The Commission possesses the legal authority to establish interim requirements and guidelines related to ETC standards. NEB.REV.STAT. § 86-128(3) specifically provides the Commission with the authority to "adopt and promulgate rules, regulations, *and requirements* to be observed by a carrier so classified or grouped as the commission deems necessary or desirable and in the public interest." (Emphasis supplied) *Id.*

In its Rule and Regulation No. 165 proceedings, the Commission has undertaken the task of creating new rules and regulations regarding ETC standards. In this proceeding, the Commission is utilizing its authority to assure that clear and well-reasoned ETC requirements are established until such time as formal rules and regulations become effective. The Commission should be commended for the prudent use of its authority in this proceeding.

Further support for the Commission's authority to implement interim requirements and

¹ RTCN consists of the following rural local exchange carriers: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cozad Telephone Company, The Curtis Telephone Company, Diller Telephone Company, The Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hooper Telephone Company d/b/a WesTel Systems, Keystone-Arthur Telephone Company, Mainstay Communications, Plainview Telephone Company, Inc., and Wauneta Telephone Co..

guidelines is the Commission's own precedent. See *In the Matter of the Application of the Nebraska Public Service Commission on its own Motion to set Guidelines for Mediation, Arbitration, and Reviews of Negotiated Agreements under the Telecommunications Act of 1996*, Application No. C-1128 (May 28, 1997); and *In the Matter of the Petition for Declaratory Ruling of Lincoln Electric System*, Application No. C-2925 (August 19, 2003). In each of the aforementioned proceedings, the Commission utilized its authority to implement interim requirements and guidelines.

In fact, in Application No. C-2925 the Commission made the following determination: “[I]t is important to recognize that the Nebraska Legislature authorized the Commission to create requirements beyond what the Commission adopts as rules and regulations. According to NEB. REV. STAT. § 86-128(3), ‘The Commission may adopt and promulgate rules, regulations, **and requirements** . . . as the commission deems necessary or desirable and in the public interest.’” (Emphasis in Original) Application No. C-2925 at Page 2-3. Thus, it is clear that the Commission has the legal authority to implement interim guidelines or requirements regarding ETC standards to remain in place until Rule and Regulation No. 165 becomes effective.

Substantive Comments

The Commission's proposed interim guidelines are substantially the same as its proposed rules and regulations in the Rule and Regulation No. 165 proceedings. Therefore, as part of these comments, RTCN hereby references and submits its Revised Comments filed in Rule and Regulation No. 165 and requests that the Commission consider such comments as they apply in substance to the these proceedings. Such Comments are attached hereto as **Exhibit A**.

In addition to its comments set forth in Exhibit A, RTCN suggests a change to Paragraph 5 of the Commission's proposed interim guidelines. Paragraph 5 states: “Any common carrier that has been designated by this Commission as an eligible telecommunications carrier must submit the

information required by paragraph 009.02A6 and 009.02A7 of this section no later than October 1, 2006.” The reference to “paragraph 009.02A6 and 009.02A7” is undoubtedly an inadvertent mistake, and therefore, RTCN respectfully suggests that the language of paragraph 5 should be changed to state as follows: “Any common carrier that has been designated by this Commission as an eligible telecommunications carrier must submit the information required by paragraph 2(f) and 2(g) of this section no later than October 1, 2006.”

In addition, paragraph 6 of the Commission’s proposed guidelines refers to certain obligations for ETCs but does not reference when or how frequently such obligations must be fulfilled. The corresponding section of the proposed Rule and Regulation No. 165 is titled, “Annual Reporting Requirements for Designated Eligible Telecommunications Carriers.” RTCN respectfully suggests that reference be made in paragraph 6 to the due date and frequency of such obligations.

DATED this 6th day of June, 2005.

RURAL TELECOMMUNICATIONS COALITION OF
NEBRASKA, PROTESTANTS,
Arapahoe Telephone Company d/b/a ATC Communications,
Benkelman Telephone Company, Inc.,
Cozad Telephone Company,
Curtis Telephone Company,
Diller Telephone Company,
The Glenwood Telephone Membership Corporation,
Hartman Telephone Exchanges, Inc.,
Keystone-Arthur Telephone Company,
Mainstay Communications,
Plainview Telephone Company,
Wauneta Telephone Company, and
WesTel Systems f/k/a Hooper Telephone Company.

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EXHIBIT A

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own)	RULE AND REGULATION NO. 165
motion, seeking to amend Title 291, Chapter)	
5, Telecommunications Rules and)	
Regulations, to add rules for designating)	REVISED COMMENTS OF THE
eligible telecommunications carriers in)	RURAL TELECOMMUNICATIONS
Nebraska for the purpose of receiving)	COALITION OF NEBRASKA
federal universal service support.)	

By Order entered April 26, 2005, the Nebraska Public Service Commission (the "Commission"), on its own motion, opened this proceeding to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to add rules for designating eligible telecommunications carriers ("ETC") in Nebraska for the purpose of receiving federal universal service support (the "Order"). The Rural Telecommunications Coalition of Nebraska ("RTCN") respectfully submits the following comments in connection with the Commission's Order:

I. Introduction

On March 17, 2005, the Federal Communications Commission ("FCC") released a Report and Order² adopting, in part, several of the Federal-State Joint Board on Universal Service ("Joint Board") recommendations and enacting certain rules pertaining to the designation of eligible telecommunications carriers ("ETCs") and maintenance of that designation. The FCC also recommended that the states consider adopting, at a minimum, the same requirements. Therefore, the Nebraska Public Service Commission ("Commission") has proposed amending its existing rules -- found in Title 291, Chapter 5 -- in accordance with the FCC's recommendation.

² In the Matter of the Federal-State Joint Board on Universal Service, *Report and Order*, FCC 05-46, CC Docket 96-45, released March 17, 2005 ("*ETC Designation Order*").

The Commission has requested that interested parties comment upon these proposed rule changes.

The Rural Telecommunications Coalition of Nebraska³ (“RTCN”), includes the following independent telecommunications companies: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cozad Telephone Company, Curtis Telephone Company, Diller Telephone Company, Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges Inc., Keystone-Arthur Telephone Company, Mainstay Communications, Plainview Telephone Company, Wauneta Telephone Company, and WesTel Systems f/k/a Hooper Telephone Company. Each member of RTCN is a rural incumbent local exchange carrier (“LEC”) providing basic local exchange and other telecommunications services to Nebraska customers. Additionally, all RTCN companies have both ETC and Nebraska Eligible Telecommunications Carrier (“NETC”) designations, obligating them to specific responsibilities in exchange for federal and state universal service support in order to provide telecommunications services in high-cost areas. The following comments represent the views of the RTCN.

RTCN strongly recommends that the Commission adopt the new FCC requirements as minimum standards for ETC designation in Nebraska. Additionally, RTCN recommends that the Commission supplement or clarify several of the FCC’s requirements, including: 1) minimum standards for service area coverage; 2) state commission oversight of consumer protection and service quality; and 3) minimum local usage requirements. When adopted, these standards will ensure that federal universal service support is used for its intended purpose – assuring the

³ The Rural Telecommunications Coalition of Nebraska was formerly known as the Nebraska Independent Coalition for Embedded-Based Cost Support (“NICE-BCS”).

availability of affordable, high-quality telecommunications service to all Nebraskans living in remote and high cost areas.

II. Evolution of the Public Interest Standard

The Telecommunications Act of 1996 (“1996 Act”) states that an ETC must: 1) be a common carrier; 2) offer the services supported by universal service support mechanisms, pursuant to Section 254(c); 3) offer these services throughout the service area for which the designation is received; and 4) advertise the availability of such services and the associated charges.⁴ Additionally, prior to designating an additional ETC for an area served by a rural LEC, the state commission must ascertain that the proposed designation is in the public interest.⁵

Unfortunately, Congress did not provide any specificity to state commissions as to how to ascertain the public interest standard. As a result, interpretation of the public interest has differed widely between state commissions. While some state commissions diligently established criteria to enable a thoughtful consideration of a public interest standard, many others merely provided competitive carriers unfettered access to federal support mechanisms on the grounds that “competition is always in the public interest.” Because competitive ETC support is allowed to grow unchecked,⁶ the result has been predictable -- an explosion in federal support provided to competitive ETCs.⁷

⁴ Section 214(e)(1).

⁵ Section 214(e)(2).

⁶ This differs significantly from federal support mechanisms available to rural LECs, which are subject to stringent caps to severely limit growth.

⁷ Universal service support for competitive ETCs has increased from \$20 million in 2001 to a projected \$492 million in 2005. Virtually all this support will be received by wireless ETCs, with ten wireless carriers alone projected to \$379 million. Source: Universal Service Administrative Corporation quarterly filings, accessed at www.universalservice.org

Fortunately, state and federal regulators have both reached the conclusion that a more stringent and consistently applied public interest finding is necessary to comply with the requirements of the 1996 Act. This process began with the FCC requesting the Joint Board to review the rules relating to high-cost universal service support in study areas with multiple ETCs.⁸ The Joint Board recommended guidelines that would promote a more stringent public interest analysis in the evaluation of ETC applications than had previously occurred.⁹ The FCC adopted several of these recommendations as additional mandatory requirements for ETC designation proceedings.¹⁰ The FCC substantially increased an ETC applicant's burden of proving its designation as an ETC is in the public interest by requiring the following:

1. Demonstrate a commitment and ability to provide services to all customers within its proposed service area;
2. Demonstrate its ability to remain functional in emergency situations;
3. Demonstrate that it will satisfy consumer protection and service quality standards;
4. Offer local usage plans comparable to those offered by the incumbent local exchange carrier in the areas for which it seeks designation; and
5. Acknowledge that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations.¹¹

III. Capability and Commitment to Provide Universal Service

The Commission should clearly establish that the primary requirement for access to universal service support mechanisms is to actually provide universal service. This requirement is not met by serving some of the customers within the designated service area, but by the ability to serve **all** the customers. This requires the Commission to assess both the capability and the

⁸ In the Matter of the Federal-State Joint Board on Universal Service, *Order*, FCC 02-307, CC Docket 96-45, released November 8, 2002.

⁹ In the Matter of the Federal-State Joint Board on Universal Service, *Recommended Decision*, FCC 04J-1, CC Docket 96-45, released February 27, 2004.

¹⁰ See *ETC Designation Order*

¹¹ *Ibid.* para. 2

commitment of the applicant to meet this requirement. The FCC cautions that this must be a meaningful demonstration:

We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state Commission its ability and willingness to provide service upon designation.¹²

The starting point for any reasonable demonstration of capability should be the applicant's existing ability to offer services throughout the requested ETC designation area. ETC designations should not be awarded to applicants who merely promise to provide service universally at some indeterminate future date. ETC designation should entail a minimum amount of existing coverage. This significantly limits carriers from receiving support mechanisms merely to duplicate existing networks. While some carriers already adhere to an internal minimum service standard before seeking ETC designation,¹³ the establishment of a formal minimal service standard would ensure a more consistent determination of the public interest.

The FCC's requirement that ETC applicants provide a formal plan demonstrating how high-cost universal service support will be used to improve coverage, service quality or capacity,¹⁴ provides excellent guidance for the Commission to assess an applicant's commitment to providing universal service. The FCC's requirement for a plan reflecting how support will be

¹² See *South Dakota Declaratory Ruling*, FCC 00-248, released August 10, 2000, para. 24.

¹³ See CPUC Docket No. 04A-411T. Direct testimony of James Blundell asserts that Western Wireless does not seek ETC status unless it is capable of serving at least 85 percent of the population. Citing the Western Wireless standard, however, should not be interpreted as concurrence with its propriety. In order to comply with the 1996 Act, the standard should be based on a percentage of geographic area served, not population.

¹⁴ See *ETC Designation Order* para. 23

used to construct facilities that, absent receipt of such support, otherwise would not exist, ensures that universal service funds will be used to provide universal service; not merely to accelerate the construction of facilities that would have occurred regardless of receiving of such funds. The specificity required by the FCC in these construction plans will also ensure that universal service funds enhance facilities in high-cost areas where high-cost support is required to provide universal service.

The requirement for a specific construction plan also enhances the Commission's ability to certify to the FCC that the competitive ETC is using universal service support for the intended purpose.¹⁵ This is especially critical with regards to wireless ETCs for two reasons. First, unlike universal service support for rural LECs, competitive ETC support is not attributable to any investments made or costs incurred to provide service by the recipient.¹⁶ Second, also unlike rural LECs, wireless ETCs do not use universal service support to reduce the cost of providing service in high-cost areas.¹⁷ Requiring a specific construction plan establishes the connection required by the 1996 Act between universal service support and investment in facilities. Furthermore, this requirement will end the practice of wireless ETCs using universal service support primarily to enhance their bottom line, as evidenced by this quote from a leading executive in the wireless industry:

¹⁵ Required under § 254(e)

¹⁶ Under current FCC rules, federal high-cost support for competitive ETCs is identical to the per-line amount received by the incumbent LEC.

¹⁷ Generally, wireless carriers offer the same calling plans at the same prices to all customers, regardless of ETC status. Wireless ETCs do not use universal service support to reduce rates for existing calling plans.

The USF subsidy represents an incremental revenue source, which we believe should improve our revenue and EBITDA estimates by \$6-8 million during the first quarter and \$24-30 million during 2003 as *the incremental revenue is almost all margin*.¹⁸

Finally, the commitment to provide universal service cannot be open-ended. Accordingly, the Commission should establish a fixed time period within which the ETC is required to meet this commitment. This will ensure a genuine commitment, and not merely lip service, to providing universal service. The Commission has previously proposed a fixed time period for eligibility to the Nebraska Universal Service Fund ("NUSF").¹⁹ For consistency, the Commission should adopt the identical requirement for ETC status.

IV. Service Quality Standards

ETC applicants voluntarily request ETC designation from this Commission – a status which will provide it with a substantial amount of funds from universal service support mechanisms. This ETC designation should be accompanied by attendant responsibilities and requirements such as state commission oversight of service quality and customer service standards. The National Association of State Utility Consumer Advocates ("NASUCA") has observed the following:

¹⁸"Western Wireless (WWCA): USF Provides Upside to Our EBITDA Estimate," Salomon Smith Barney Research Note, issued January 9, 2003, at page 2 (*emphasis added*). Quote from Western Wireless CEO John Stanton in a meeting with the investment community. According to USAC projections, Western Wireless will receive \$44 million in federal high-cost support in 2005.

¹⁹ See *In the Matter of the Nebraska Public Service Commission, on its own Motion, Seeking to Establish a Long-Term Universal Service Funding Mechanism*, Application No. NUSF-26, Progression Order No. 4, entered January 7, 2003, para. 37. The Commission proposed that a NETC be required to provide service to all subscribers within a service area within six months.

In the case of ILEC ETCs, the *quid pro quo* is self-evident and traditional. ILECs typically provide high quality, highly reliable service ubiquitously throughout their service territory and are providers of last resort for that territory. Moreover, customers of ILECs have the substantial benefit of state regulation, which enforces service quality rules, billing and collection rules, and ensures just and reasonable rates. By contrast, wireless carriers are generally unregulated entities that provide highly variable service quality, varying levels of customer service, unilaterally determined billing and collection policies, unilaterally determined rates and have no requirement to provide facilities in specific areas.²⁰

Unfortunately, the FCC has indicated that a wireless carrier demonstrate its commitment to consumer protection and service quality standards by agreeing to comply with the Cellular Telecommunications and Internet Association's ("CTIA") Consumer Code.²¹ This is clearly inadequate. CTIA developed its Consumer Code to forestall several state commissions from imposing real consumer protections in response to an avalanche of consumer complaints about the practices of the wireless industry. In other words, the CTIA Consumer Code was designed to protect wireless carriers, not wireless customers. NASUCA offers a much better solution to state commissions that desire to ensure that services supported by universal service are affordable, reliable and available under reasonable terms and conditions. NASUCA recommends this be accomplished by the following:

NASUCA also urges more stringent requirements for ETC designation. Such designation should be granted only to entities providing communications service that is reliable, affordable and comparable to that of current incumbent providers of last resort. NASUCA presumes that providers using wireless and other technologies would continue to be eligible for ETC status. However, NASUCA recommends that eligible services by such providers must constitute basic, reliable and affordable connectivity. *In addition, any ETC must be subject to certain aspects of state regulation even if it provides service using a technology that is*

²⁰ *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*, CC Docket No. 96-45, Comments of NASUCA at p 8, filed May 5, 2003.

²¹ See *ETC Designation Order* para. 28.

*not otherwise regulated by the state.*²²

Several other state commissions agree with the recommendations of NASUCA and have required ETC applicants to submit to limited oversight in exchange for ETC designation. On six different occasions, the Colorado Public Utilities Commission (“CPUC”) has granted ETC designations to wireless carriers. All six of the ETC designations were conditioned upon the applicant agreeing to limited oversight of service quality and customer service by the CPUC, as evidenced by this excerpt from its most recent proceeding:

Therefore, based on the above findings regarding our legal authority and the public interest requirements of CMRS ETC providers, and in concert with our previous decisions granting ETC status to rural wireless providers, we find that designating Western Wireless as an ETC is in the public interest. *However, this is only when conditioned with important Commission standards including affordability and customer protection.*²³

As permitted under the 1996 Act,²⁴ the CPUC oversees the terms and conditions under which wireless ETCs provide universal service. This oversight includes, but is not limited to, the following:

- 1) Consumer complaints;
- 2) Termination of service;
- 3) Billing and collections;
- 4) Bill credits for service interruptions;
- 5) Network maintenance and operation;
- 6) Directory services; and
- 7) Timeframes for offering service.

²² *Ibid.*, p. 3 (emphasis added).

²³ CPUC Decision C04-0545, adopted May 26, 2004, para. 113 (emphasis added).

²⁴ 47 U.S.C. § 332(c)(3)

One of the principal responsibilities of state commissions is consumer protection. State commissions have personnel, procedures and processes in place to respond to consumer concerns. This responsibility should clearly reside with the state commission, not the FCC.

V. Minimum Local Usage

RTCN strongly recommends that the Commission adopt the FCC's requirement that competitive ETCs offer local usage comparable to the amount offered by the incumbent LEC. Because all rural incumbent LECs in Nebraska offer unlimited local calling, competitive ETCs should be required do likewise with their qualifying universal service offerings. Furthermore, past experience has taught the Commission (as well as several other state commissions) that it must elicit more than a promise from wireless ETC applicants to "offer" a calling plan with unlimited local usage.²⁵ Instead, the Commission must verify that a wireless carrier is offering an affordable universal service offering with unlimited local usage **prior** to granting it ETC status. Finally, the Commission should clearly emphasize that federal universal service support is only attributable to qualifying universal service offerings. While RTCN is aware that some state commissions are considering reduced local usage requirements for wireless ETCs,²⁶ we strongly

²⁵ Western Wireless committed to several state commissions (including Nebraska) to offer a fixed wireless service with unlimited local usage. Western Wireless claimed that this offering (entitled the "Basic Universal Service" plan) was the vehicle with which it would compete with rural LECs in the universal service market. In retrospect, the main purpose of the BUS "offering" was to convince state commissions to grant it ETC status, which it used to obtain support from USAC for its existing traditional cellular customer base. The CPUC is in the midst of a proceeding to investigate the "bait and switch" tactics employed by Western Wireless and its non-existent BUS offering. See CPUC Docket No. 04F-474T.

²⁶ The Oklahoma Commission has proposed requiring all qualifying universal service offerings include at least 500 minutes of local calling absent usage-sensitive charges. See OCC Cause No. RM 200400014.

encourage the Commission to retain the FCC's requirement for local usage comparable to that offered by the incumbent LEC.

VI. Conclusion

Federal and state regulators have reached a consensus – that competitive ETC designations in the service areas of rural LECs require a much more stringent analysis than has been afforded in the past. This consensus has culminated in the FCC's recent release of new ETC eligibility requirements – requirements the FCC encourages state commissions to also adopt. RTCN recommends that the Commission adopt the FCC's new requirements, with some modification. Specifically, the Commission should require: 1) minimum standards for service area coverage; 2) state commission oversight of consumer protection and service quality; and 3) minimum local usage requirements. RTCN is convinced that this action by the Commission will ensure that federal universal service support is actually used to promote and advance universal service.

Wireless carriers will undoubtedly assert that many of the FCC's ETC eligibility requirements are somehow not “technologically” neutral. This is the same tired argument trotted out each time a wireless ETC applicant faces any obligation (carrier of last resort, equal access, unlimited local calling, state commission oversight) in exchange for ETC designation. The Commission should ignore these blatantly self-serving claims and remind wireless ETCs that universal service funds are a scarce resource and that it is in the public interest to limit their access only to providers of *universal* service.